



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT THIKA**

**ELC APPEAL NO. 43 OF 2019**

**KEZIAH MUGURE NJUGUNA.....APPELLANT/APPLICANT**

**VERSUS**

**NAOMI WAMBUI GACHICHA.....1<sup>ST</sup> RESPONDENT**

**GITHUNGURI CONSTITUENCY RANCHING COMPANY LIMITED .....2<sup>ND</sup> RESPONDENT**

**(Being an Appeal from the Judgment and/ or Ruling of the Hon. M. W. Wanjala – Senior Resident Magistrate at Thika Law Courts delivered on 23<sup>rd</sup> May 2019, in the Chief Magistrate’s Court Civil Suit No. 953 of 2010 at Thika)**

**JUDGMENT**

The Appellant herein **Keziah Mugure Njuguna** was the 1<sup>st</sup> Defendant, the 2<sup>nd</sup> Respondent was the 2<sup>nd</sup> Defendant while the 1<sup>st</sup> Respondent **Naomi Wambui Gachicha**, was the Plaintiff in Thika CMCC 952 of 2010, wherein the Plaintiff had sued the Defendants and Judgment entered as against the Defendants on 4<sup>th</sup> October 2018.

After the entry of the Judgment, by a Notice of Motion Application dated 18<sup>th</sup> March 2019, the Appellant sought for orders that;

- 1. That the Law Firm of Mbai Waweru Advocates be granted leave to come on record for the 1<sup>st</sup> Defendant herein in place of the Law Firm of P.K Njoroge & Company Advocates.**
- 2. That the proceedings, judgment and consequential orders herein be set aside and the suit be heard afresh**
- 3. That a temporary order of injunction do issue restraining the Plaintiff from selling, subdividing, transferring or otherwise disposing of the parcel of land known as Ruiru /Kiu Block 2( Githunguri) 2511 now known as Ruiru Kiu Block 2( Githunguri) 22090 pending the hearing and determination of this suit.**

The Application is premised on the fact that the 1<sup>st</sup> Defendant (Appellant) entered appearance and filed her Defence in person on 27<sup>th</sup> September 2010, and appeared in Court personally on 22<sup>nd</sup> February 2011. That the 1<sup>st</sup> Defendant (Appellant) has never been served with any Notice to appear in Court after the attendance on 22<sup>nd</sup> February 2011. Further that on 22<sup>nd</sup> November 2013, the Law Firm of **P.K Njoroge & Company Advocates** entered appearance apparently after the 2<sup>nd</sup> Defendant (2<sup>nd</sup> Respondent) was served with an Amended Plaint, filed on 16<sup>th</sup> August 2013. That the 1<sup>st</sup> Defendant(Appellant) never instructed the said Law Firm of **P.K Njoroge & Company Advocates** to represent her in the matter and no notice of appointment of Advocates was filed by the said Advocates in view of the fact that the 1<sup>st</sup> Defendant had already entered appearance in person.

Further that the 1<sup>st</sup> Defendant (Appellant) was not aware that the suit was scheduled for hearing on 22<sup>nd</sup> August 2018, and she did not therefore attend Court. That **Njoroge Kimiri** practicing as **P.K Njoroge & Company Advocates**, last held a practicing certificate in the year 2016 and could therefore not represent the Defendants particularly on 22<sup>nd</sup> August 2018. That the 1<sup>st</sup> Defendant (Appellant) has a valid and strong Defence against the Plaintiff’s claim and given an opportunity, she would prove that she is the lawful registered owner of the suit property having inherited the same from her deceased husband. That the Plaintiff (1<sup>st</sup> Respondent) had referred the dispute to the Ruiru District Land Disputes Tribunal (LDT), wherein, in her claim for the suit property was dismissed. That if the Application is not allowed, the 1<sup>st</sup> Defendant(Appellant) will lose the said land to the Plaintiff (1<sup>st</sup> Respondent) or third parties thereby occasioning her irreparable loss.

In her Supporting Affidavit, **Keziah Mugure Njuguna** averred that the suit property belonged to her late husband one **Samuel Njuguna Karera**, who died on 3<sup>rd</sup> September 2006, and by a Certificate of Grant, the suit property was issued to her to hold in trust for her

children. That sometime in **2009**, the Plaintiff (1<sup>st</sup> Respondent) encroached onto the suit properties and began developments. That she reported the matter to **Ruiru Police Station** and also filed a claim at the Lands Dispute Tribunal and on **23<sup>rd</sup> September 2010**, and the tribunal determined that the suit property belonged to her late husband. That at the time of the decision of the tribunal, she was not aware that the Plaintiff (1<sup>st</sup> Respondent) had filed the instant suit. Further that the Plaintiff (1<sup>st</sup> Respondent) appealed the said decision of the tribunal, but the same was affirmed by the Appeals Committee. That she appeared in Court on **22<sup>nd</sup> February 2011**, and was informed by the Court that the dispute had been referred to the Land Disputes Tribunal (LDT) and the same was at the Appeal stage, and in the circumstances the matter was stood over Generally. That since then, she was never served with any pleadings in the matter.

That sometimes in **February 2019**, she was surprised when she learnt that an order issued by the Court had been registered against the title, with effect of cancelling the title. That she perused the Court file and realized that the matter had proceeded for hearing in her absence. That she does not know the Law Firm of **P.K Njoroge Advocates** nor did she instruct them and on **18<sup>th</sup> February 2019**, when she wrote to the Law Society of Kenya seeking details of the said Law Firm and the LSK confirmed that **Njoroge Kirimi Peter** proprietor of the Company last held a practicing certificate in the year **2016**.

That she engaged the services of **L. Mbaru Advocate**, who upon perusal of the Court file discovered that the Plaintiff unprocedurally filed an Amended Plaint on **13<sup>th</sup> June 2013**. Further that on **16<sup>th</sup> August 2013**, the Plaintiff further unprocedurally filed an Amended Plaint amongst other issues. Further that on **22<sup>nd</sup> November 2013**, the Law Firm of **P.K Njoroge & Company Advocates**, entered appearance for both Defendants and on **26<sup>th</sup> November 2013**, the Court entered Judgment and in its Judgment dated **4<sup>th</sup> October 2018**, the Court concluded that the Judgment was against the 2<sup>nd</sup> Defendant only since she had already entered appearance and filed a defense. That on **26<sup>th</sup> July 2018**, the Law Firm of **Wangari & Company Advocates** came on record for the Plaintiff and on **22<sup>nd</sup> August 2018**, the matter proceeded for hearing ex parte.

That the Law Firm of **P.K Njoroge & Company Advocates** was allegedly served with the hearing notice on Friday **17<sup>th</sup> August 2018**, to attend Court on **22<sup>nd</sup> August 2018**, but the hearing Notice for **22<sup>nd</sup> August 2018**, does not bear the stamp of the said law firm unlike the previous notices. That the Plaintiff (1<sup>st</sup> Respondent) unsuccessfully challenged the decision of the Appeals Committee in a Judicial Review Application filed at the High Court and the Decree given on **8<sup>th</sup> August 2011** in Thika DO Case **No. 81 of 2010** has not been set aside

The Application was opposed and **Naomi Wambui Gachucha**, the Plaintiff (1<sup>st</sup> Respondent) swore a Replying Affidavit on **29<sup>th</sup> March 2019**, and averred that upon service of the Plaint filed on **14<sup>th</sup> September 2010**. Messer **P.K Njoroge & Company Advocates** filed a Memorandum of Appearance on **13<sup>th</sup> September 2013**, and a defence was filed on **27<sup>th</sup> February 2016**. That though Judgment was entered for nonappearance and Defence on **26<sup>th</sup> November 2013**, her Advocates then on record never failed to serve the Defendants Advocates with all the necessary notices to attend Court. That the issue before the Tribunal was in relation to the trespass on the suit property and hence her instant suit in relation to the title. That she was not privy to the facts that the Appellants had not instructed **P.K Njoroge & Company Advocates**, and that the said Advocate was personally served with the hearing Notice on **17<sup>th</sup> August 2018**. That she purchased the suit property on **10<sup>th</sup> January 2009**, from one **Wilson Mwangi Ngoni**, took possession and constructed a permanent house and despite the injunctive orders, the 1<sup>st</sup> Defendant (Appellant) proceeded to subdivide the suit property.

Further that when she obtained the abstract of the title, she learnt that the original **Title L. 25111**, had been closed for subdivision to **L.R 1706-17081**, and that there is no explanation as to how **L.R 2511** became **L.R 22090**. That at first, she was acting on her own behalf and thereafter instructed **Mr. Kamiro R.N, Advocate**, to act for her. That from the share certificate annexed to the Applicant's affidavit, the same held  $\frac{1}{4}$  an acre whereas from the clearance certificate issued to her by the 2<sup>nd</sup> Defendant, the suit premises is approximately  $1\frac{1}{4}$  acres.

The Application was canvassed by way of written submissions after which the trial Court delivered its Ruling dated **23<sup>rd</sup> May 2019**, and dismissed the said Application and held that;

**“If the said Advocate was irregularly on record, or had filed the Memorandum of Appearance without instructions from the 1<sup>st</sup> Defendant then the 1<sup>st</sup> Defendants recourse is against that Advocate in accordance with the provisions of the Advocates Act .....**”

The Appellant being aggrieved the said decision filed a Memorandum of Appeal dated **14<sup>th</sup> June 2019**, and sought for orders that ;

**1. This Appeal be allowed.**

**2. The Ruling of the Learned Magistrate delivered on 23<sup>rd</sup> May 2019 be set aside and the same be substituted with an order on relief as this Honourable Court may deem fit in the circumstances.**

The grounds upon which the Appeal are grounded are ;

**1. That the Learned Trial magistrate erred in Law and in fact in failing to find that the Law Firm of P.K Njoroge & Company Advocates was improperly on record for the Appellant.**

**2. That the learned Magistrate erred in Law and in fact in failing to find that the Appellant was not aware that the suit was scheduled for hearing on 22<sup>nd</sup> August 2018 .**

3. That the Learned Magistrate erred in Law and in fact in failing to find that the Appellant was not aware that she had an Advocate on record for her.
4. That the Learned Magistrate erred in Law and in fact in failing to consider and find that Njoroge Peter Kimiri t/a P.K Njoroge & Company Advocates was not entitled to practice law and represent the Appellant on 22<sup>nd</sup> August 2018 or ever at all.
5. That the Learned trial Magistrate erred in Law and in fact in failing to grant the Appellant a chance to have her case heard on merits.
6. That the Learned trial Magistrate erred in Law and in fact in failing to consider the weight of the Appellant's evidence that she intended to present at the trial.
7. That the Learned Trial Magistrate erred in Law and in fact in failing to consider whether the 1<sup>st</sup> Respondent would have suffered prejudice that cannot be compensated by way of costs if the Appellant's Application dated 18<sup>th</sup> March 2019 were to be allowed.
8. That the Learned trial magistrate erred in Law and in fact in dismissing the Appellant's Application dated 18<sup>th</sup> March 2019 thereby denying the Appellant a chance to ventilate her Defence to the 1<sup>st</sup> Respondent's claim.
9. That the Learned trial Magistrate erred in Law in ignoring case law cited by the Appellant in her submissions.
10. That the Learned trial magistrate erred in Law and in fact in finding that the Appellant's recourse against the filing P.K Njoroge & Company Advocates was in accordance with the provisions of the Advocates Act.
11. That the Learned trial Magistrate erred in law and in fact in failing to find that the Law Firm of P.K Njoroge & Company Advocates had not been served/properly served with a hearing notice for 22<sup>nd</sup> August 2018.
12. That the Learned Trial magistrate erred in Law and in fact in dismissing the Appellant's Application dated 10<sup>th</sup> March 2019.

The Court directed that the Appeal be canvassed with by way of written submissions and in accordance with the said directive , the Appellant through the Law Firm of **Mbai Waweru & Company Advocates** filed her written submissions dated **22<sup>nd</sup> April 2021**, and submitted that as per the provisions of **Order 9 Rule 7 and 9**, the said Law Firm of Advocates ought to have filed a Notice of Appointment of Advocates , the Appellant having filed a Notice to act in person necessitated the said Advocates to put in a Notice to formally come on record and as such the Law Firm of **P.K Njoroge & Company Advocates** were strangers in the suit as a Notice of Appointment formally authorizing them was neither filed nor served.

It was further submitted that the proprietor of **P. K Njoroge & Company Advocates** did not have a practicing certificate as at **22<sup>nd</sup> August 2018**, and could not purport to represent the Appellant and thus the said proprietor is an unqualified person. That the Appellant was denied a chance to be heard on merit as envisaged by **Article 50 of the Constitution of Kenya 2010**, which provides for a fair hearing and the Court was urged to afford the Appellant the chance to tender evidence in support of her claim to the suit property . That the trial Court failed to consider the provisions of law as well as case law furnished in support of the Application seeking to set aside the Judgment . The Appellant relied on **Order 12 Rule 7, Order 40 Rule 1 of the Civil Procedure Rules** and the case of **Stephen Ndichu ....Vs.... Monty's Wine & Spirits (2016) eKLR** amongst other authorities.

It was the Appellant's further submissions that the entire proceedings were marred with irregularities , fraud and deception and the Respondent was the ultimate beneficiary of the said absurdities at the expense of the Appellant. The Court was urged to allow the Appeal.

The 1<sup>st</sup> Respondent filed her written submissions through the Law Law Firm of **Jane Wangari Muthoga & Company Advocates** dated **30<sup>th</sup> March 2021**, and submitted that there is a Memorandum of Appearance dated **12<sup>th</sup> September 2013**, and filed on **22<sup>nd</sup> November 2013**, and that the Appellant had filed the Memorandum of Appearance upon service of the Plaint. The Court was urged to find that no Firm of Advocates can come on record without instructions. It was further submitted that the only way the Appellant learnt of the order in place was because she had instructed the Law Firm of **P.K Njoroge & Company Advocates**. Further that given that for over 8 years, she had not sought to know the position of her case, the same was not believable. That it was the Appellant's duty to find out if the Advocate she had instructed was proper or not . That the Court considered the merits of the Appellant's Application and the Appellant having been served failed to file a Defense and an interlocutory judgment was entered against her. That though the Appellant filed a Memorandum of Appearance, she failed to file any documents and the Defense filed does not bear any Court's stamp nor is it legible and does not raise any triable issues.

The Court has now carefully read and considered the written submissions, the Record of Appeal and the Memorandum thereto, the provisions of law and the findings of the trial Court and renders itself as follows;

As this is a first Appeal, it is the Court's duty to analyze and re-assess the evidence on record and reach its own independent decision in the matter as provided by **Section 78 of the Civil Procedure Act**. See the case of **Selle...Vs...Associated Motor Boat Co. [1968] EA 123 where the Court held that;**

**“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs. Ali Mohamed Sholan(1955), 22 E. A. C. A. 270).**

Further as the Court determines this Appeal, it takes into account that it will only interfere with the discretion of the trial Court where it is shown that the said discretion was exercised contrary to the law or that the trial Magistrate misapprehended the applicable law and failed to take into account a relevant factor or took into account an irrelevant factor or that on the facts and law as known, the decision is plainly wrong. See the case of Mbogo vs Shah (1968) EA at Page 93, where the Court held that: -

**“I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior Court unless it is satisfied that its decision is clearly wrong because it has misdirected itself or because it has acted on matters on which it should not have acted on because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”**

It is not in doubt that the orders sought by the Appellant are those of setting aside of the proceedings of **22<sup>nd</sup> August 2018** that culminated into the Judgment delivered on **4<sup>th</sup> October 2018**, allowing the 1<sup>st</sup> Respondent’s case. The jurisdiction of the court to review and set aside its decisions is wide and unfettered. In the case of Shah...Vs...Mbogo and Another [1967] EA 116 the Court of Appeal of East Africa held that:

**“This discretion (to set aside ex parte proceedings or decision) is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.”** (*emphasis added*)

Further it is also not in doubt that in deciding whether or not to exercise its discretion and set aside an Ex Parte Judgment and or proceedings, the Court needs to be satisfied that there is sufficient cause brought forth by the Applicant to warrant it exercise its discretion in the Applicant’s favour. See the case of Wachira Karani v Bildad Wachira [2016] eKLR where the Court held that;

**“Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause...”**

Bearing the above in mind, the Court will therefore proceed and determine whether the Appellant had shown sufficient cause to warrant the Court exercise its discretion. It is the Appellant’s contention that when the matter came up for hearing on **22<sup>nd</sup> August 2018**, she was not served with the hearing notice and therefore was unable to attend Court as she was not aware of the said hearing. Further the Appellant blamed the Law Firm of **P.K Njoroge & Company Advocates**, for purporting to **Enter Appearance**, on her behalf and filing a Defence and yet she had not instructed the said Law Firm of Advocates.

It is not in doubt that the Law Firm of **P.K Njoroge & Company Advocates** actually entered appearance for the Defendants on **12<sup>th</sup> September 2013**, and filed a Defence dated **26<sup>th</sup> February 2014**. It is further not in doubt that the said Firm of Advocates was served with the hearing notice. What is in doubt however is whether the said **Firm of Advocates** had instructions from the Appellant to represent her.

This Court therefore needs to determine whether the Appellant did satisfy it that she never gave instructions to the said Firm of Advocates to represent her in the suit and therefore not capable of being served with the hearing notice on her behalf.

Having perused the lower Court’s file and the proceedings produced as Record of Appeal, there is no doubt in the Court’s mind that the Appellant was served with the Summons to Enter Appearance, the Appellant then did Enter Appearance and filed a Defence dated **24<sup>th</sup> September 2010**, all filed on **29<sup>th</sup> September 2010**. The Court has also seen the proceedings of **22<sup>nd</sup> February 2011**, in which the Court **Stood Over the matter Generally**, when it noted that there were proceedings at the tribunal. The next proceedings were on **22<sup>nd</sup> November 2013**, where the Court entered Interlocutory Judgment as prayed in the Plaint for failure to enter appearance and file a defence. A casual look informs this Court that the same could not be proper as there was a Defence and Appearance already in the Court file.

Further the Court has seen the Memorandum of Appearance and Statements of Defence filed on **22<sup>nd</sup> November 2013**, by the **Law Firm of P.K Njoroge & Company Advocates**. The Appellant had already filed a Memorandum of Appearance and a Defence and in the Court’s considered view if the Appellant was to instruct the said Law Firm of **P.K Njoroge Advocates**, it would only be obvious that she would have relayed this information to the said Law Firm and there would be no need for the said Law Firm to again enter appearance and file a Defence. While the Court acknowledges the 1<sup>st</sup> Respondent’s reservation as to why the Appellant would take a whole 8 years without checking on her case, the Court also notes that the same was stood over generally due to the proceedings that were ongoing at the tribunal. This in the Court’s considered view could have informed the Appellant not to follow up on the matter.

The Court having considered the proceedings of this case, and noting that the Appellant had appeared in Court, entered appearance and even filed a Defence, notes that this may not be signs of a person who would be negligent enough not to follow up on her case, unless there was sufficient reason also noting that she participated in the Judicial Review proceedings in which Judgment was entered in 2013. The Court is

thus satisfied with the Appellant's contentions that she did not instruct the Law Firm of **P.K Njoroge & Company Advocates**. Having not instructed the said Law Firm, it follows that the said Law Firm had no **locus stand** to act on her behalf and also receive documents on her behalf including the hearing notices.

To this end, the Court finds that the Appellant has shown sufficient reasons for nonattendance on the hearing date, as an Advocate she did not instruct and who she was not in communication with may have failed to communicate to her as the hearing Notices ought to have been served on her personally as she acted in person.

The Court has also considered the 1<sup>st</sup> Defendant's statement of Defence dated **24<sup>th</sup> September 2010**, and notes that the same raises triable issue and in particular as on who is the legal owner of the suit property and denial of the 1<sup>st</sup> Respondent as the owner of the suit property. The same are issues that the Court needs to determine in the interest of justice. See the case of **CMC Holdings Limited ...Vs... James Mumo Nzioki [2004] eKLR**, where the Court held that

**"The law is now well settled that in an application for setting aside ex parte judgment, the court must consider not only reasons why the defence was not filed or for that matter why the applicant failed to turn up for hearing on the hearing date but also whether the applicant has reasonable defence which is usually referred as whether the defence if filed already or if a draft defence is annexed to the application, raises triable issues."** (*Emphasis theirs*)

Therefore, this Court finds and holds that the Appellant has shown sufficient cause to warrant it exercise its discretion and set aside the ex parte proceedings.

It is not lost this Court that the instant matter is a matter that was filed in **2010** and needed to be heard and determined. However, this is a Court of equity and it needs to give chance for a party to be heard on merit when that party did not get that chance at the very least the Rules of natural Justice and fair Administrative actions requires the Court to do so. The Court notes that the trial Court in declining to grant the orders sought stated that the Appellant had recourse as against the said Firm of Advocates. But what recourse? The Appellant states that she did not instruct the said Advocates and it would follow that there would be no basis upon which the Appellant would seek any recourse. See the case of **Pravinchandra Jamnadas Kakad ...Vs...Lucas Oluoch Mumia [2015] eKLR** where the Court held that ;

**"In my view, the issue of professional negligence is neither here nor there, as the defendant has not, in his depositions accused his then advocates, Mr. Ombeta of any professional negligence. What I hear him saying is that he did not instruct Mr. Ombeta's Law Firm to enter appearance on his behalf or even to file a defence in the matter. If that is the case, then where does professional negligence arise? "**

Having found that the Appellant has demonstrated sufficient cause warranting the setting aside of the impugned proceedings; and that her defence raises triable issues; and sufficient cause has been shown for nonattendance, the Court finds the Application merited.

Having now carefully re-evaluated and re-assessed the available evidence before the trial court and the Memorandum of Appeal, the Record of Appeal together with the written submissions, the Court finds that the trial Magistrate did not exercise his discretion properly and therefore arrived at an improper decision and this Court has no option but to interfere with the trial Court's discretion and set aside the Ruling of the Court and allow the said Application.

The upshot of the foregoing is that the Appellant's Appeal is found **merited** and consequently the said Appeal is allowed entirely and the Ruling and order of the trial Court is set aside and the Application dated **18<sup>th</sup> March 2019** allowed.

On the issue of costs, the Court finds the same is granted at the discretion of the court. Given the circumstances of the case, the Court directs that each party to bear its own costs on this Appeal.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT THIKA THIS 24<sup>TH</sup> DAY OF SEPTEMBER, 2021**

**L. GACHERU**

**JUDGE**

**Court Assistant – Lucy**